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STATE OF WISCONSIN
SUPREME COURT

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OF WISCONSIN**

Case No. 2017AP2278

KRISTI KOSCHKEE, AMY ROSNO,
CHRISTOPHER MARTINSON, and
MARY CARNEY,

Petitioners,

v.

TONY EVERS, in his official capacity as
Wisconsin Superintendent of Public Instruction
and WISCONSIN DEPARTMENT OF
PUBLIC INSTRUCTION,

Respondents.

**REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE
ON BEHALF OF PEGGY COYNE, MARY BELL, MARK W. TAYLOR,
COREY OTIS, MARIE STANGEL, JANE WEIDNER, AND
KRISTIN A. VOSS**

INTRODUCTION

Proposed Intervenors, Peggy Coyne, Mary Bell, Mark W. Taylor, Corey Otis, Marie Stangel, Jane Weidner and Kristin A. Voss, ("the Proposed Intervenors") did not file a motion to intervene at an earlier stage of this litigation because it would have been inappropriate. The Proposed Intervenors did not possess an interest in the ancillary issues

considered by the Court in this case after the time that the Petition for Original Action was filed on November 20, 2017: the issue of which attorneys were to represent the Superintendent and the Department of Public Instruction, of whether the Governor was a necessary party and if the Respondents' motion to dismiss should be granted. The last of those issues was resolved when the Respondents' Motion to Dismiss was decided on September 4, 2018.

Nor did they have an interest that was generated by the petition for an original action itself regarding the constitutionality of the REINS Act's application to the DPI until the Petitioners submitted a brief that specifically asked the Court to overrule *Coyne v. Walker*, 2015 WI App 21, 361 Wis. 2d 225, 862 N.W.2d 606 (hereinafter "*Coyne*") the effect of which would be to dissolve the permanent injunction that had been issued and affirmed in *Coyne*.

The interests of the Proposed Intervenor in preserving the permanent injunction issued in *Coyne* are not adequately represented by Respondents.

ARGUMENT

Petitioners raise two issues in opposition to the motion for intervention: (a) that the motion to intervene was not timely; and (b) that

the interests of the Proposed Intervenors are sufficiently represented by the Respondents. Neither of those assertions is correct.

I. THE MOTION TO INTERVENE WAS TIMELY MADE.

The Petitioners suggest that the Proposed Intervenors should have moved to intervene at an earlier stage of this case, claiming that (a) ten months ago Petitioners filed a Petition to commence this original action; (b) six months ago the parties briefed ancillary issues of who should represent Respondents and whether the Governor was a necessary party; (c) five months ago this Court granted the Petition; (d) three months ago this Court decided the ancillary issues; and (e) two months ago this Court set a briefing schedule.

For the following reasons, it would have been inappropriate for Proposed Intervenors to have filed a motion to intervene at any of these previous stages of this case.

First, the Petition for the Court to accept this case as an original action was filed on November 20, 2017, asking this “[c]ourt to **determine** the effect of its decision in *Coyne v. Walker* on this matter.” Petition at 9. (emphasis added) The Petition did not ask this Court to overrule *Coyne v. Walker*.

Second, following the filing of the Petition, the Court focused on who was to represent the Superintendent and the Department of Public Instruction. Those issues were not resolved until June 27, 2018 with the Court stating at Paragraph 20 of its Order:

This case raises the question of whether DPI must submit a scope statement to the governor in the first instance. It does not raise the question of what the governor does with a scope statement if submitted. A declaration in this case will not affect the governor's responsibilities under the REINS Act. The governor will still review a scope statement if he receives one whatever the outcome of this case.

That statement appeared to say that the issue of whether the governor could prohibit the Superintendent from submitting a scope statement to the legislature was not before the Court, meaning that the injunction in *Coyne* was not an issue that the Court would review.

Third, on August 6, 2018, the Respondents filed a motion to dismiss.

Fourth, on August 10, 2018, while the motion to dismiss was pending the Petitioners filed their primary brief which revealed their primary goal: convincing this Court to overrule *Coyne*, the effect of which would be to dissolve the permanent injunction earned by the Proposed Intervenors after years of litigation in the circuit court, the Court of Appeals and this Court. That was the first time that the Proposed

Intervenors definitively knew that the Petitioners wanted *Coyne* to be overruled.

Fifth, while that motion was pending, it would have been inappropriate for the Proposed Intervenors to have filed a motion to intervene because it was uncertain that the case would continue.

Sixth, the motion to dismiss was denied on September 4, 2018. The motion to intervene was filed on September 14, 2018, a mere ten days after the Proposed Intervenors knew that the case would continue and that the Court would be addressing the issue of whether the injunction granted in *Coyne* should be dissolved by the Court, overruling that two year old decision.

Undoubtedly, the Proposed Intervenors' motion was timely.

II. PROPOSED INTERVENORS DEMONSTRATED AN INTEREST THAT IS NOT ADEQUATELY REPRESENTED BY THE PARTIES.

The Court must evaluate motions to intervene “with an eye toward disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 742-43, 601 N.W.2d 301 (Ct. App. 1999). By permitting the requested intervention, the Court will correctly apply that standard.

The Proposed Intervenor's interest in this case is to preserve their injunction in *Coyne*. Allowing the requested intervention will not prejudice any party. There is no imminent threat to the public's safety or health which would drive the Court to act with alacrity. Nor is there any pending administrative rule that awaits a decision of this Court before it can be implemented.

The Proposed Intervenor's do not claim that they have a **right** to intervention. Instead, they seek **permission** to intervene because, were the Court to overrule *Coyne*, they would be deprived of the permanent injunction that protects their interests as taxpayers, parents and teachers. Thus, they have a substantial "interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest," Wis. Stat. § 803.09.

Petitioners argue that the Respondents adequately represent Proposed Intervenor's interests. The Petitioners are wrong. The Respondents are defending the powers of the Superintendent of Public Instruction. The Proposed Intervenor's are seeking to protect their permanent injunction in *Coyne* because that injunction protects their

interests. Although those interests may align with those of the Superintendent, they are separate and distinct.

The Proposed Intervenor should, therefore, be allowed to fully participate in this matter.

III. CONCLUSION

The Motion of the Proposed Intervenor to Intervene should be granted.

Respectfully submitted this 28th day of September, 2018.

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